IN THE DISTRICT COURT OF BEAVER COUNTY, OKLAHOMA

Fitzgerald Farms, LLC, on behalf of itself and all others similarly situated,

Plaintiff,

v.

Chesapeake Operating, LLC (including affiliated predecessors and successors),

Defendant

v.

Charles David Nutley,
W. Stephen Smith, and
James W. Polonis,

Objectors.

Case No. CJ-2010-38-A

PLAINTIFF SETTLEMENT CLASS'S EXPEDITED MOTION TO COMPEL DEPOSITION

Plaintiff Settlement Class moves for an order compelling Objector Nutley (Charles David Nutley) to sit for a deposition on a date, at a time, and at a location set by this Court.

Statement of Facts

1. Objector Nutley objected to the proposed class action settlement. Designation of Foundational Filings from CJ-2010-38 ("Designation), Document # 12.

2. Objector Nutley did not appear personally at the Fairness Hearing on June 26, 2015, but did appear through counsel, Stephen C. Griffis. Designation, Document # 27. [1] Mr. Griffis

[1] This made Mr. Nutley a party to a case filed years ago. There is no restriction on the timing of discovery against Mr. Nutley as his counsel alleges without citation to any authority.

earlier filed an Entry of Appearance in CJ-2010-38 on March 31, 2015, the date on which Objector Nutley filed his objection to the proposed class action settlement. Designation, Document # 11.

3. This Court denied Objector Nutley's objections in their entirety and his claims were severed from those of the Settlement Class. The Court assigned a separate case number, Case No. CJ-2010-38-A, for further proceedings. Designation, Document ## 27-29.

4. To minimize damages to the Settlement Class if Objector Nutley attempts to appeal the denial of his objection on behalf of himself and, contrary to the Order Granting Severance, the entire Settlement Class whom he admits he does not represent, the Settlement Class filed a motion for an appeal bond in Case No. CJ-2010-38. Designation, Documents ## 24-25.

5. In his response to the appeal bond motion, Objector Nutley indicated he intended to appeal the attorney's fee issue on behalf of the entire Settlement Class. Opposition to Settlement Class's Motion to Set Appeal Bond and Brief in Support attached as **Exhibit A** at 1 ("He [Nutley] challenges only the fee award to Class Counsel, which if reduced, would result in a second distribution to the class members if and when an appeal is decided.").

6. The Settlement Class then filed a motion for damages, sanctions, discovery, and injunctive relief against Objector Nutley and his attorneys. Settlement Class's Motion for: (1) Enforcement of the Settlement Agreement; (2) Sanctions; (3) Discovery; (4) Damages; and (5) Injunctive Relief Against Professional Objector Nutley and His Attorneys and Brief in Support (filed July 14, 2015) ("Mot. for Enforcement").

7. The Settlement Class also served Objector Nutley with a Notice of Deposition on July 14, 2015. *See* Notice of Deposition of Charles David Nutley (filed July 14, 2015); Email from Vanessa Noah to Counsel, including scgriffis@gmail.com, attached as **Exhibit B.** The Notice set the deposition for July 21, 2015 in Beaver, Oklahoma. *See* Not. of Depo. of Charles David Nutley.

8. On Friday, July 17 at 4:57 p.m., Mr. Griffis, emailed a letter to Settlement Class Counsel declaring that Objector Nutley would not attend the deposition set for July 21, 2015. *See* Email from S. Griffis to R. Sharp, attaching letter, all attached as **Exhibit C**.

9. Settlement Class Counsel promptly emailed Mr. Griffis on July 17, 2015 at 5:19 p.m., and informed him that a motion to quash the notice of deposition was required and offering to negotiate alternative dates and places for the deposition if that would be sufficient to proceed. *See*. Exh. C.

10. On Monday, July 20, 2015 at 9:56 a.m., Settlement Class Counsel again emailed Mr. Griffis for a response and again offered to negotiate alternative dates and places for the deposition if that would be sufficient to proceed. Mr. Griffis emailed Settlement Class Counsel a second letter on July 20, 2015, at 1:13 p.m., again refusing to produce Objector Nutley. *See* Emails and letter between Griffis and Sharp on July 20, 2015, attached as **Exhibit D**.

11. Settlement Class Counsel promptly emailed Mr. Griffis on July 20, 2015 at 1:38 p.m., and informed him that this motion would be forthcoming. *See*. Exh. D.

12. No motion to quash the notice of deposition of Objector Nutley has ever been received by Settlement Class Counsel or filed with the Court. *See* Docket Sheet.

Argument and Authorities

The Court has the power to order discovery from objectors.

> [C]lass counsel may seek discovery *from* objectors on issues such as the objectors' proof of their membership in the class, the factual basis of their objections, any past objections they have made, and their relationships with the professional objector counsel. As objectors often seek to appeal rejection of their objections, and class counsel as frequently will seek to require the objector to post an appeal bond, "discovery may be utilized to ensure that each objector is capable of posting bond in the full amount." If objectors do not comply with the discovery sought, class counsel must seek a court order to compel them to do so.
> ***

> Courts have ordered objectors to comply with discovery requests in specific limited situations, *typically involving professional objectors*, and have even ordered such discovery after entry of final judgment while a case was on appeal.

Discovery from Objectors, Newberg on Class Actions § 13:33 (5th ed.) (emphasis added). Discovery into Mr. Nutley's membership in the class, the factual basis of his objection, his history of making objections, his relationships with professional objector counsel, and his ability to post an appeal bond should he file an appeal are relevant and proper subjects of inquiry. The Settlement Class, represented by Settlement Class Counsel, seeks Nutley's testimony on these and other subjects and asks the Court to compel his attendance and testimony at deposition.

A notice of deposition properly served on a party to a lawsuit operates as a court order compelling appearance and testimony. 12 O.S. Supp. 2010 § 3230. To avoid the obligation to appear for a deposition, a party must timely seek a protective order under 12 O.S. Supp. 2010 § 3226(C). 12 O.S. Supp. 2010 § 3230 (E)(1). Failure to seek a protective order constitutes a waiver of any basis to object to or quash the place, date, and circumstances surrounding such deposition. *See, e.g., Atkins v. State,* 1977 OK CR 150, 562 P.2d 947, 949 (requiring timely filing of a verified motion to quash and addressing waiver in the criminal context --"if the motion to quash is not filed before a plea is entered…the defendant waives any defect in the information that could have been raised by a motion to quash."). Failing to appear for a deposition (without having filed a motion for protective order or motion to quash) subjects the uncooperative party to sanctions under 12 O.S. Supp. 2010 § 3237(E). *Root v. SDI of Owasso,* 2011 OK CIV APP 125, ¶ 7, 268 P.3d 547, 549. Among the sanctions available is an order from the court compelling such party to appear at a particular place, date and time for submission to the deposition. *See,* 12 O.S. Supp. 2010 § 3237 (B)(2) and (E); *Root,* 2011 OK CIV APP at ¶ 11, 268 P.3d at 549 (trial court's order mandated "attendance at…deposition at a time/date certain") & n.2 (trial court ordered "the deposition take place on a certain date and time."). Likewise, the Court could strike the noncompliant party's pleadings if that party fails to comply with the Court's order compelling the discovery. 12 O.S. Supp. 2010 § 3237(B)(2)(c); *see Omni Air Transp., LLC v. Aviation W. Charters, Inc.*, 2014 OK CIV APP 89 (unpub.) (sanctions proceedings are equitable in nature, listing factors to consider); and *Zenergy, Inc. v. Palace Exploration Co.*, 2015 WL 1164314 (Okla. Dist. Ct. Jan. 29, 2015) (citing *Omni Air*).

Here, Objector Nutley simply refuses to comply with the notice of deposition and has filed no motion for protective order or motion to quash. Settlement Class Counsel has offered to accommodate any concerns of Objector Nutley as to the date or location of the deposition. *See* Exhibit D. Objector Nutley has ignored these offers. *Id.* By failing to file a motion for protective order or to appear for deposition, Objector Nutley has waived any objection he may have had to the location, date or other circumstances surrounding such deposition.

Conclusion

Objector Nutley cannot simply ignore the Settlement Class's notice of deposition and fail to appear without moving for a protective order. The Settlement Class asks the Court, by further order, to compel Objector Nutley's appearance in Beaver, Oklahoma, in July at 9 a.m. at the Beaver County Courthouse to provide testimony in response to questions posed by Settlement Class Counsel or other parties.

Objector Nutley should also be put on notice that any further failure to comply with a court order (regarding depositions or any other matters), will subject him to substantial sanctions, including but not limited to the striking of his objection, whether before or during appeal.

The Settlement Class requests an expedited hearing on this matter by telephone if that is most convenient for the Court.

Respectfully submitted,

____

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SETTLEMENT CLASS COUNSEL

CERTIFICATE OF SERVICE

Pursuant to Oklahoma Rules of Civil Procedure, I hereby certify that on the 21st day of July, 2015, I served a true and correct copy of the foregoing by electronic transmission to the parties on electronic file, hand-delivery, and/or depositing the same in the United States mail, first class postage fully prepaid to the person and addresses listed below:

ATTORNEYS FOR DEFENDANT:

David K. Petty
David K. Petty Law Offices
301 Northwest 5th Street
Guymon, OK 73942
petty1@pettylawoffice.com

John F. Shepherd
Baron Craig Bartel
Holland & Hart
555 17th Street, Ste. 3200
PO Box 8749
Denver, CO 80201
jshepherd@hollandhart.com
bcbartel@hollandhart.com

ATTORNEYS FOR OBJECTORS:

Stephen C. Griffis
The Griffis Law Firm, PLLC
3035 N.W. 63rd Street, Suite 229
Oklahoma City, OK 73116
scgriffis@gmail.com

[signature]

IN THE DISTRICT COURT OF BEAVER COUNTY
STATE OF OKLAHOMA

BEAVER COUNTY OKLAHOMA
FILED
JUL 14 2015
TAMMIE PATZKOWSKY
COURT CLERK
BY ______ TP DEPUTY

FITZGERALD FARMS, LLC, on behalf of itself and all others similarly situated,	)
Plaintiff,	)
vs.	) **Case No. CJ-2010-38**
CHESAPEAKE OPERATING, INC.,	)
Defendant.	)

OPPOSITION TO SETTLEMENT CLASS'S MOTION TO SET APPEAL BOND AND BRIEF IN SUPPORT

Class member Charles David Nutley hereby opposes the Settlement Class's Motion to Set Appeal Bond, as no such thing is recognized or authorized by Oklahoma law. An appeal bond is a creature of federal law, specifically Fed. R. Civ. P. 7. There is no analogous rule in the Oklahoma Rules of Civil Procedure.

The only bond recognized under Oklahoma law is a *supersedeas* bond, which may be imposed only when an appellant requests a stay of the judgment on appeal. *See* Supreme Court Rule 1.15 and 12 O.S. §§ 990.4. Here, any request for a *supersedeas* bond is grossly premature. No judgment had been entered at the time of the Motion, let alone an appeal filed or a request for a stay by any appellant. There is no basis for the entry of any bond under Oklahoma law until each of these three things has occurred.

Objector Nutley does not seek a stay of the distribution of the settlement fund, or at least as much of that fund as will be awarded to the class, as soon as the judgment is entered. He challenges only the fee award to Class Counsel, which, if reduced, would result in a second distribution to the class members if and when an appeal is decided.

EXHIBIT A

Therefore, Class Counsel's professed concern with protecting the class is a red herring. Class Counsel is seeking to hold the class hostage to his pursuit of his fee.

All of the cases cited in the Settlement Class' Brief are federal cases interpreting FRAP 7, and have no relevance to or application in Oklahoma law. In any event, the Tenth Circuit has limited appeal bonds to the costs of appellate briefing. *Tennille v. Western Union Fin. Svcs. Inc.*, 774 F.3d 1249 (10th Cir. 2014). Therefore, if this case were in federal court, the appeal bond would be limited to no more than $2000, the estimated costs of appellate briefing submitted by Mr. Sharp.

There are no reported cases anywhere in the country in which a state court has imposed an appeal bond. Such a bond exists only in federal law, a creature of FRAP 7.

Finally, the Settlement Agreement cannot serve as the basis for imposition of an appeal bond that does not exist under Oklahoma law. First, the relevant clause in the Settlement Agreement states that "the objector's claim will be either severed from the rest of the Class that did not object ***or*** the Settlement Court will require the objector to post an appeal bond ..." It is one or the other. Therefore, to the extent that class members could be deemed to have consented to this clause merely by not objecting to it before the relevant motions were filed, they only consented to one or the other of the remedies, not both. Class Counsel has already moved for and been granted severance. Therefore, they may not seek an appeal bond in addition to severance, at least not in reliance on the language in the Settlement Agreement,

Second, the relevant language merely announced an intention to file the relevant motions for severance and an appeal bond, in contrast to the language used in the settlement document construed in *Hershey v. Exxon Mobil Oil Corp.*, 550 Fed. App'x

566, 569 (10th Cir. 2013)("each Class Member that appeals agrees to put up a cash bond to be set by the district court sufficient to reimburse Class Counsel's appellate fees, Class Counsel's expenses, and the lost interest to the Class caused by the delay"). Here, there was no agreement by "each class member," as there was in *Hershey*, that might have placed class members on notice that they needed to object to the clause at the time of objection rather than later in opposition to the threatened motions. In any event, Objector Nutley is opposing this motion now, at the appropriate time (other than the fact that the motion is premature). There is no reason to set an arbitrary deadline for objecting to something that becomes relevant only in the event of an appeal, which has not yet occurred in this case.

Parties to a class action may not create by their agreement something that is otherwise not permitted under the laws of Oklahoma, which does not recognize something called an "appeal bond." This is another factor distinguishing this case from *Hershey*. Federal appellate rules do recognize such a thing as an appeal bond, and the settlement agreement in *Hershey* arguably expanded the categories of costs that could be included in the bond. While Objector Nutley believes that the Tenth Circuit decided *Hershey* wrongly, the Tenth Circuit did not create something out of whole cloth that does not exist in federal law. That is precisely what Class Counsel is asking the Court to do here.[1]

[1] Contrary to Class Counsel's scurrilous insinuation, attorney Pentz's involvement in this case does not fall short of compliance with anything in Oklahoma law, and in fact is expressly authorized by Okla. Rule of Professional Conduct 5.5, which permits an out of state attorney to participate in a matter "undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter." Stephen C. Griffis is an Oklahoma attorney who is actively participating in this matter.

CONCLUSION

WHEREFORE, Objector Nutley prays that this Court DENY the Motion to Set Appeal Bond.

Respectfully submitted,
Charles David Nutley,
By his attorney,

Stephen C. Griffis
THE GRIFFIS LAW FIRM, PLLC
3035 N.W. 63rd Street, Suite 229
Oklahoma City, OK 73116
Tel: (405) 607-8757
Fax: (405) 607-8749

CERTIFICATE OF SERVICE

The undersigned certifies that on July 10, 2015 he served a true copy of the foregoing document by first class U.S. mail, postage prepaid, on each of the counsel listed below:

Rex A. Sharp
Gunderson Sharp LLP
5301 W. 75th St.
Prairie Village, KS 66208

John F. Shepherd
Holland & Hart
555 17th Street, Ste. 3200
Denver, CO 80201

Stephen C. Griffis

From: Vanessa Noah
To: petty1@pettylawoffice.com; John F. Shepherd; Barry C. Bartel; scgriffis@gmail.com; stevengsmith61@gmail.com
Cc: Rex Sharp; Barbara Frankland; Arthur W. Schmidt; Greg Mahaffey
Subject: Fitzgerald Farms v. Chesapeake Operating v. Charles David Nutley, et al., Case No. CJ-10-38-A
Date: Tuesday, July 14, 2015 12:39:15 PM
Attachments: 20150714 Offer of Judgment to Objector Nutley.pdf
20150714 Mtn. for Leave to File Brief in Excess of 15 Pages.pdf
20150714 SC"s Mtn. for Enforcement of Settlement Agreement etc.pdf
20150714 Notice of Deposition of Charles David Nutley.pdf

Counsel,

Attached are your service copies of the following:

1. Offer of Judgment to Objector Nutley;
2. Motion for Leave to File Brief in Excess of 15 Pages;
3. Settlement Class's Motion for: (1) Enforcement of the Settlement Agreement; (2) Sanctions; (3) Discovery; (4) Damages; and, (5) Injunctive Relief Against Professional Objector Nutley and His Attorneys and Brief in Support; and
4. Notice of Deposition of Charles David Nutley

These pleadings were filed with the Court today. A courtesy copy is being sent to Judge Parsley.

Vanessa Noah, Paralegal
Gunderson Sharp, LLP
5301 W. 75th Street
Prairie Village, KS 66208
913.901.0505
913.901.0419 facsimile

The information contained in this email (and any attachments), is attorney PRIVILEGED and CONFIDENTIAL information intended only for the use of the individual or entity(s) to whom it is addressed. If you are not the intended recipient, or party authorized to deliver it to the intended recipient, DO NOT read, forward, copy, disclose, distribute, or use this communication in any manner, send us a reply indicating your receipt, and DELETE the email and any attachments permanently from your system.

EXHIBIT B

From: Rex Sharp
To: scgriffis@gmail.com
Subject: Ches OK : Deposition notice
Date: Friday, July 17, 2015 5:19:19 PM

Steve,

Thanks for your letter.

This case was commenced about 5 years ago. You entered your appearance on March 31, 2015. The case was severed on July 2, but that does not trigger when the case is commenced for purposes of taking a deposition. If you believe otherwise, I urge you to move to quash, cite your legal authority, and we can have a hearing. Otherwise, I intend to appear for the deposition and take a certificate on non-appearance.

On the other hand, if your letter was just a way of asking for a more convenient time or location, I am happy to oblige as long as it can be done sometime next week, and I am happy to travel to OKC or even California if your client prefers.

Please let me know.

Rex

From: Steve Griffis [mailto:scgriffis@gmail.com]
Sent: Friday, July 17, 2015 4:57 PM
To: Rex Sharp
Subject: Deposition notice

Please see attached letter.

SG

--

Stephen C. Griffis
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EXHIBIT C

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VIA ELECTRONIC MAIL to
RSharp@midwest-law.com and
U.S. MAIL

July 17, 2015

Rex A. Sharp
Gunderson Sharp LLP
5301 W. 75th St.
Prairie Village, KS 66208

RE: Fitzgerald Farms, LLC v. Chesapeake Operating, Inc., Case No. CJ-2010-38

Mr. Sharp:

The deposition notice you sent on Tuesday, July 14, 2015, is invalid. First, 12 O.S. §3230 which you purport is the basis of your notice requires leave of the court to take any deposition prior to the expiration of 30 days from the service of summons and petition upon the defendant (see 12 O.S. §3230A(2)(a)(2)), or, in other words, from the commencement of any action. My client was made a party defendant only by virtue of the severance order filed on July 2, 2015. That separate action was commenced on that date. Leave of the court requires a motion, 15 days for response, a hearing, etc. In any event, four days' notice of the taking of my client's deposition is wholly insufficient given his residence. My client will not be available for deposition on the 21st of July.

If you have any questions or need additional information, don't hesitate to contact me using my mobile number, as that is the easiest way to reach me.

Sincerely,

Stephen C. Griffis
For Objector, Charles David Nutley

From: Rex Sharp
To: scgriffis@gmail.com
Subject: Ches OK : Deposition notice
Date: Monday, July 20, 2015 4:46:09 PM

Steve,
I have followed the law, but you have not.
I want to reiterate that I am willing to depose your client anywhere at any time *this week*.
Rex

From: Steve Griffis [mailto:scgriffis@gmail.com]
Sent: Monday, July 20, 2015 4:10 PM
To: Rex Sharp
Subject: Re: Ches OK : Deposition notice

Rex,

I never said I would not produce my client for a deposition anywhere or at any time, I simply expected that you would want to follow the Oklahoma Rules of Civil Procedure regarding depositions. It appears that we disagree with the rules that apply in this unique situation and you seem to want it both ways - characterizing my client as a party in a five-year old case. The truth of the matter is that it is one or the other, that is, either my client is a party in a three-week old case, or he is a non-party witness in a five-year old case and can only be subpoenaed in California. Certainly four business days notice is wholly insufficient in any case. If you continue on this outrageous abuse of process, I will have no alternative but to seek sanctions of my own.

Thanks,
SG

On Mon, Jul 20, 2015 at 1:37 PM, Rex Sharp <rsharp@midwest-law.com> wrote:

> Steve,
> Thanks for your 7/20/15 letter.
> First, as you suggest in your letter, I will not bother to incur the unnecessary travel and deposition expense since your client will not be attending.
> Second, since you apparently refuse to file a motion to quash the deposition notice and have your arguments put to the timely test of a judge and will not produce your client for a deposition anywhere or at any time, I will have no alternative but to move to compel and seek sanctions.
> Third, I will set this matter for hearing as soon as possible, which will probably be by telephone.
> Rex
>
> **From:** Steve Griffis [mailto:scgriffis@gmail.com]
> **Sent:** Monday, July 20, 2015 1:13 PM
> **To:** Rex Sharp
> **Subject:** Re: Ches OK : Deposition notice

EXHIBIT D

Rex,

In response to this morning's email, please see attached letter.

Thanks,
SG

On Mon, Jul 20, 2015 at 9:56 AM, Rex Sharp <rsharp@midwest-law.com> wrote:

> Steve,
> I will probably start driving about 2pm today, so I would appreciate your response before then. Perhaps we can work out a more convenient place or time.
> Rex
>
> ---
>
> **From:** Rex Sharp
> **Sent:** Friday, July 17, 2015 5:19 PM
> **To:** 'scgriffis@gmail.com'
> **Subject:** Ches OK : Deposition notice
>
> Steve,
> Thanks for your letter.
> This case was commenced about 5 years ago. You entered your appearance on March 31, 2015. The case was severed on July 2, but that does not trigger when the case is commenced for purposes of taking a deposition. If you believe otherwise, I urge you to move to quash, cite your legal authority, and we can have a hearing. Otherwise, I intend to appear for the deposition and take a certificate on non-appearance.
> On the other hand, if your letter was just a way of asking for a more convenient time or location, I am happy to oblige as long as it can be done sometime next week, and I am happy to travel to OKC or even California if your client prefers.
> Please let me know.
> Rex
>
> **From:** Steve Griffis [mailto:scgriffis@gmail.com]
> **Sent:** Friday, July 17, 2015 4:57 PM
> **To:** Rex Sharp
> **Subject:** Deposition notice
>
> Please see attached letter.
>
> SG
>
> --
> Stephen C. Griffis
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VIA ELECTRONIC MAIL to RSharp@midwest-law.com and U.S. MAIL

July 20, 2015

Rex A. Sharp
Gunderson Sharp LLP
5301 W. 75th St.
Prairie Village, KS 66208

RE: Fitzgerald Farms, LLC v. Chesapeake Operating, Inc., Case No. CJ-2010-38

Mr. Sharp:

Let me reiterate what I wrote last week. My client cannot and will not appear at the deposition in Beaver tomorrow. Right or wrong, there is no justification or necessity for you to travel there or to pay for a court reporter to be there.

On the issue of the propriety of the notice, if you are contending that the litigation began five years ago, then my client cannot be anything but a non-party witness, which requires a subpoena, and likewise requires the deposition to be noticed for California, pursuant to 12 O.S. §3230.

If you are contending that the severance created a case in which he is a party defendant, then you may, I suppose, serve a deposition notice, but there is no question that the inception of that case was July 2, 2015. The deposition notice is, in that case, premature. Further, please note that we will object to any such deposition because it is plainly for harassment purposes and not to obtain any relevant or admissible facts.

If you have any questions or need additional information, don't hesitate to contact me using my mobile number, as that is the easiest way to reach me.

Sincerely,

Stephen C. Griffis
For Objector, Charles David Nutley